No. 22-CV-593

District of Columbia Court of Appeals

KS Condo, LLC Appellant, vs. Fairfax Village Condominium VII, Appellee.	Appeal from the Judgment of the Superior Court of the District of Columbia (No. 2019 CA 006922 B)

BRIEF OF APPELLANT, KS CONDO, LLC

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I. LIST OF ALL PARTIES, INTERVENORS, AMICI CURIAE, AND THEIR COUNSEL IN THE TRIAL COURT OR AGENCY PROCEEDING AND IN THE APPELLATE PROCEEDING

- KS Condo, LLC (Plaintiff below)
- Fairfax Village Condominium VII (Defendant below)
- Jonathan M. Stern (counsel for Plaintiff/Appellant)
- Brian Fellner (counsel for Defendant/Appellee)
- Thomas C. Mugavero (Whiteford Taylor) (counsel for Appellee)
- Ellen M. Moroney (Whiteford Taylor) (counsel for Appellee)

II. DISCLOSURE STATEMENT

KS Condo, LLC is a District of Columbia limited liability company.

Its members are Jesse B. Kaye and Jason A. Stern.

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V. STATEMENT OF JURISDICTION

This appeal is from a final judgment of the Superior Court that disposes of all parties' claims.

VI. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Did the trial court err (either as a matter of law or as an abuse of discretion) in requiring expert testimony to establish the standard of care of a condominium association board composed of laypersons faced with a visibly bulging and cracking foundation common element wall after being warned by a property inspector and a structural engineering firm that the wall was at imminent risk of collapse and had to be addressed as soon as possible?

B. Is a ruling that expert testimony is ***required*** reviewed for legal error or for abuse of discretion?

C. Was the trial court's assignment to the Plaintiff of the burden to prove that the defendant condominium association had the means to timely raise funds needed to make urgent repairs legally erroneous?

D. Was the trial court's conclusion that the plaintiff condominium unit owner had not proved that the defendant condominium association had the means to timely raise funds for urgently needed repairs clearly erroneous.

E. Was the trial court's conclusion that speculation was required to decide whether the condominium board's failure to make urgently required repairs

led to the collapse of a foundation wall a misapplication of law or clearly erroneous?

VII. STATEMENT OF THE CASE

KS Condo, LLC ("KS Condo") owned a unit (the "Unit") in 3810 V Street, which is part of Fairfax Village Condominium VII ("Fairfax Village"). KS Condo leased the Unit to a tenant and collected monthly rent. On July 29, 2017, a foundation wall in the basement of 3810 V Street collapsed, and the City declared the building uninhabitable. The Unit was damaged, and KS Condo lost income because of its uninhabitability.

More than two years before the collapse, Fairfax Village's board of directors (the "Board") learned that the foundation wall, which had buckled and was visibly deformed, was at risk of collapse and advised unit owners that repairs were urgently needed within 30 days.

18 months before the collapse, the Board was advised by a professional property inspector and a structural engineering firm that the buckling wall was displaced by approximately three inches, constituted a serious structural problem, and should be addressed "as soon as possible." The Board repeatedly advised unit owners that the risk was "S E R I O U S," the need "urgent," and the consequences of failure to act would be collapse of the wall and lawsuits against

Fairfax Village. The wall collapsed with no reinforcement or repair work having been done.

KS Condo filed a civil action for negligence. The case was tried remotely and without a jury. After submission of proposed findings, the trial judge made findings of fact and set forth conclusions of law. App. 0027-0040.

The trial court appropriately ruled that Fairfax Village was "responsib[le] for maintenance, repair, renovation, restoration, and replacement of the common elements," that the collapsed wall was a common element, and that Fairfax Village's duty was to act as a reasonable condominium association would under the same or similar circumstances, exercising the care required of a fiduciary of the unit owners. App. 0036-0037 (citing D.C. Code §§ 42-1903.07(a)(1), 42-1903.08(d) (2016); Fairfax Village Bylaws (App. 340, *et seq.*); *Baker v. Chrissy Condo. Ass'n*, 251 A.3d 301, 308 (D.C. 2021); *Quincy Park Condo Unit Owners' Ass'n v. D.C. Bd. Of Zoning Adjustment*, 4 A.3d 1283, 1290 (D.C. 2010) (addressing Board's fiduciary duties to unit owners)). The trial court properly equated this duty to that of a landlord to its tenant. App. 0037 (citing *Reeves v. Carrollsburg Condo. Unit Owners Ass'n*, No.: 96-2495(RMU), 1997 U.S. Dist. LEXIS 21762, at *25-26 (D.D.C. Dec. 18, 1997); *Frances T. v. Vill. Green Owners Ass'n*, 42 Cal. 3d 490, 499, 723 P.2d 573, 576 (1986)).

But the trial court then ruled as a matter of law that an expert in property management was required to establish that Fairfax Village breached the standard of care and that it was speculative to assert that the wall would not have collapsed had it timely been braced or repaired. App. 0037-0038.

The trial court entered judgment in Fairfax Village's favor on July 14, 2022. App. 0018. KS Condo filed a timely notice of appeal on August 8, 2022. App. 0172-0173.

VIII. STATEMENT OF FACTS

A. Fairfax Village and the Unit

Fairfax Village is a duly constituted condominium association in accordance with District of Columbia law and the Association's Declaration of Covenants, Conditions and Restrictions and any amendments thereto. App. 0069. It is comprised of approximately 80 condominium units across several buildings. App. 0074.

3810 V Street is a three-story brick multifamily building and part of Fairfax Village. App. 0074. The Unit is on the first floor of 3810 V Street, immediately above the basement. App. 0075. The basement is a common element of Fairfax Village. App. 0075.

B. Management of Fairfax Village

Fairfax Village is governed according to its Bylaws. App. 0069; Plaintiff Exhibit ("PX") 33 (App. 340-393).[1] Fairfax Village is managed by the Board (PX33, p. B-5: App. 346), which is comprised mostly of its residents and not their full-time jobs. App. 0066-0067, 0073.[2] The Board's "guiding principles" include "fiduciary responsibility ... to ... owners" and to "preserve, protect and improve the property." PX1: App. 181.

The Board is responsible for operation, surveillance, care, upkeep, maintenance, repair, and replacement of all common elements (App. 0073, PX33, p. B-5, 15: App. 346, 356)); hiring personnel; and contracting for the operation, maintenance, repair, and replacement of all common elements (App. 0073, PX33, p. B-5, 6: App. 346, 347). Individual unit owners, such as KS Condo, have no authority to make repairs to common elements of the Condominium. App. 0073-0074.

[1] KS Condo's Exhibits 1-34 were admitted into evidence. App. 0069-0070. Exhibits 3 and 7 were admitted for purposes other than the truth of the matters asserted. App. 0047-0048.

[2] For example, the trial judge knew the Acting President of the Board from his work as Chief of Staff for the Public Defender Service for the District of Columbia. App. 0070, 0072.

C. The Failing Foundation Wall

In March 2015, the Board identified to unit owners a "SERIOUS" issue with the basement of 3810 V Street and advised that an "urgent" repair "needs to start within 30 days" and that the Association will be at risk of lawsuits if it does not make the needed repairs. App. 0160-0162; PX1 (App. 177).

Work did not start within 30 days. Indeed, there was no evidence that the Board took any further action until December of 2015. In December, the Board had Property Diagnostics, Inc., and then the Falcon Group, inspect the 3810 V Street basement foundation wall. PX2 (App. 190); PX3 (App. 192-194). Property Diagnostics reported to the Board's President that it observed "serious structural problems":

> The rear wall of the building has moved and is not properly setting on the building footer. The lower section of the wall is buckling.
>
> The wall has moved approximately 3". We recommend having a structural engineering firm perform an evaluation of conditions, and specify requirements to repair or re-support as soon as possible. ***Delaying action could result in the building collapsing***.... We cannot over emphasize the danger of the condition, and if possible a structural engineer should be engaged immediately.

App. 190 (emphasis added).

The Board brought in the Falcon Group for the structural engineering assessment. Falcon reported that the foundation wall was "buckling ... from end to

end." It was, Falcon reported, an issue "that ***needs to be addressed and resolved as soon as possible***" and could not be cured by ongoing efforts at preventing water infiltration. The Falcon Report offered options of rebuilding the entire foundation wall or using steel beams to reinforce the foundation. App. 194. The Board understood from this letter that the basement foundation wall was a problem that required urgent attention. App. 0077.

The Board asked The Falcon Group for a proposal to design and manage the construction of the wall repair. The Falcon Group submitted its proposal on January 5, 2016. App. 430-436. In its proposal, Falcon explained that the foundation wall would have to be excavated and reconstructed and it offered "to attend a Board meeting or workshop to present this proposal and discuss this project free of charge." The plan included temporary shoring of the existing structure to allow for the excavation and reconstruction. Falcon proposed to prepare the repair design and specifications for less than $10,000 and proposed thereafter that Falcon would oversee the bidding, expedite the issuance of construction permits, and manage the construction work. App. 430-436.

The Board discussed, internally and with the homeowners, the need for a loan or special assessment to make this "urgent repair" to the foundation wall at an estimated cost of $175,000. PX4: App. 195-197 (May 19, 2016); PX6: App. 213 (May 22, 2016). The Board advised the unit owners that the wall repair was an

URGENT priority, characterized the status as "S E R I O U S," stated that money to pay for it was needed as soon as possible, that the Association could wait no longer to make the repairs, and that the Association was at risk of lawsuits if the repairs were not made. PX5: App. 196-212 (May 19, 2016).

The Board shared with the unit owners a photograph of the collapsing wall that had been taken the prior December. *See* Figure 1. PX5: App. 203; PX3: App. 193. And the unit owners were advised that "The top 3 repairs are special projects that require reserves or a special assessment funds" and "There are no reserve funds available." PX5: App. 202. The only logical conclusion from this was that a special assessment would be forthcoming, but it was not.[3]

Figure 1. Photo of collapsing wall from PX5.

[3] The Board prepared special assessment calculations on May 22, 2016. PX6: App. 213.

Notwithstanding the warnings given to the Board by Property Diagnostics ("Delaying action could result in the building collapsing.") and the Falcon Group ("needs to be addressed and resolved as soon as possible") and the urgency expressed by the Board to the unit owners, the Board took more than six-and-a-half months just to sign the Falcon proposal, finally issuing a contract for Falcon's work on July 25, 2016. Defense Exhibit ("DX") 13: App. 426-445.[4] The ***urgent*** need to fund the repairs continued to be reported by the Board to the unit owners for the next year. PX8: App. 215 (Sept. and Oct. 2016), PX9: App. 220 (Feb. 22. 2017), PX10: App. 230 (Apr. 20, 2017), DX7: App. 413 (June 12, 2017).

Within a few months of ratification, Falcon Group had designed the repair. *See* DX5: App. 407-408 (emphasis added) (where Board President suggests other board members "review the design plans that I sent ***a few months ago*** from Falcon, so that all of us are clear on project scope"). On February 18, 2017, the Board President emailed the rest of the Board: "The first bidder came onsite this week to assess the job based on Falcon design plan. Based on his very high level assessment, this will definitely be a six figure job, possibly with a '2' in front of that six figure number." DX5: App. 407-408. Thus, the first bidder came on site almost two years after the Board told the owners the work had to start within 30 days, and this was ***months*** after the design plans had been completed.

[4] All the defense exhibits were admitted. App. 049.

At the unit owners' meeting on February 22, 2017, the Board advised that the Association needed $250,000 "to perform foundation repair immediately," calling it an "URGENT" priority and characterizing the status as "S E R I O U S." The Board reported that the bidding process had begun, that the repair had to be funded by a loan to the Association or a special assessment, and reiterated that the "**Foundation Wall Repair** must be done as soon as possible." PX9: App. 220, 222-223.

At a unit owners' meeting on April 20, 2017, the Board advised that the Association needed $250,000 "to perform foundation repair immediately," calling it an "URGENT" priority and characterizing the status as "S E R I O U S." The Board again reported that the bidding process had begun. It advised that the repair had to be funded by a loan to the Association or a special assessment, that the Board was pursuing a loan, and reiterated that the "Foundation Wall Repair must be done as soon as possible." PX10: App. 230, 232-233.

At the June 12, 2017 unit owners' meeting, the officers' report again characterized the status of the foundation wall as "S E R I O U S," stated that "The Association needs est. $250,000 in funds for foundation repair immediately," stated, "If a loan is not possible, we will require a special assessment," and included,

Property Management

> • **Foundation Wall Repair** must be done as soon as possible. Structural Engineer Consultant is managing the bidding process. Gross estimates for the cost of this repair are expected to be est. $250,000. The project will take 3-6 months, and it will require excavating a major section of the courtyard area.
>
> • Action Proposed: Loan or Special Assessment needed. Currently in application process for a loan for this project, to avoid another special assessment. If that does not happen, we will notify all owners of the special assessment details.

DX7: App. 413, 418.

On July 29, 2017, the foundation wall collapsed, and the building was condemned. PX14: App. 244-255. Fairfax Village had not begun the urgently needed repairs to the foundation wall. PX31 (App. 332, Admission 12). The Unit was uninhabitable for approximately one year. App. 105, 146.

D. The Board had three means to pay for the urgent repair but used none of them.

The Board had three means to raise the money for the urgently needed repairs to the basement foundation wall. In addition to borrowing the funds, as the Board ultimately did following the collapse, the Bylaws authorized the Board to: (a) levy special assessments to address unexpected repairs (App. 0073, 0079-0080, PX33, p. B-13, 14: App. 354-355)) or (b) foreclose on units with unpaid condominium dues. App. 0073, PX33, p. B-28: App. 369. While the Board repeatedly discussed its financing alternatives, "[P]rior to the collapse of the wall,

we did not generate any funds to repair the wall." App. 89 (Herbert Robinson testimony), it did not exercise any of them.

1. The Board did not issue a special assessment.

The Board never issued a special assessment to pay for the retention or repair of the collapsing foundation wall. Both Board Members that testified at the trial testified that the Board ***never issued a special assessment*** to make the needed repair. App. 0088-0089, 0164-0165. What the evidence showed is that, for close to three years, the Board repeatedly stated that it ***could*** raise the funds through a special assessment but never did.

2. The Board did not use its foreclosure authority to raise the urgently needed repair money.

The Board did not use its foreclosure authority to raise money for the repairs. App. 0088-0089. Fairfax Village was owed approximately $400,000 by unit owners in the year prior to the collapse. PX10: App. 229; PX5: App. 204. The only evidence presented at trial to explain why the Board had not used foreclosure to raise the urgently needed money was vague testimony about unit owners dying, in bankruptcy, or lack of funds. App. 0084-0087. But the evidence showed that suits against unit owners was a viable, if not preferred, means to raise the needed funds.

Bankruptcies and deceased unit owners were not a significant problem. As of May of 2016, bankruptcies accounted for $51,621 of the amount

owed and one unit owner (owing $23,407) was deceased. PX5: App. 204. Indeed, the Bylaws made it mandatory for the Board to "take prompt action to collect any assessments for Common Expenses due from any Unit Owner which remain unpaid for more than thirty (30) days from the due date for payment thereof." PX33, p. B-14: App. 355.

3. The Board delayed borrowing money for the needed repairs until it was too late.

The Board's first serious effort to obtain a loan to make repairs did not begin until April of 2017 (more than two years after the Board said the repairs had to start within 30 days), when its contracted property management company introduced Fairfax Village to Continental Mortgage & Investment Corporation ("CMIC"), a lender. App. 0141-0145; PX11: App. 236-239. And it moved at a snail's pace from there.

The Board sought a $400,000 loan from CMIC, $250,000 of which was for the foundation wall repair. PX10 (App. 230); PX11 (App. 237). On May 24, 2017, CMIC's counsel sent draft loan documents to Fairfax Village's counsel and requested several documents that would be needed to close the loan.[5] App.

[5] The requested documents included an executed Borrower's Attorneys' Opinion Letter, copies of any necessary Condominium Board Resolutions, Certificate(s) of Insurance identifying CMIC as additional insured, copies of Association insurance policies, a DCRA Certificate of Good Standing for the Association, the Association's 2016 federal tax returns, and the Association's Condominium Declaration, Articles of Incorporation, and Bylaws. DX3 (App. 404-406).

0128-0137; PX12 (App. 240). Fairfax Village's counsel could not say whether he had provided the requested documents before the wall collapsed. *Id.* And the Board had not acted on the draft loan documents when, two months later, the wall fell. App. 0080; 0136-0137.

Aside from vague recollections from Board members, offered over KS Condo's objection for failure to provide the information in discovery,[6] that the Board had sought a loan from a bank, or that Fairfax Village had sought government assistance (App. 0158-0159),[7] there was no evidence that the Board had done anything to obtain a loan prior to April of 2017. App. 0078 ("Other than CMIC, are you aware of any other applications for a loan being made for that repair? A. I'm not – I'm not -- I don't know of any other application …."); 0082-0083, 0158-0159; PX11: App. 236. No evidence of any earlier loan application was presented at trial and Fairfax's discovery responses maintained that the only loan application made by the Board was that to CMIC in or about April of 2017:

> INTERROGATORY NO. 2. If you contend that defendant acted reasonably in responding to the concern addressed in the letter attached hereto as Exhibit B [PX3:

[6] KS Condo objected to questions about any effort to obtain funds from a bank on the ground that KS Condo "asked in discovery for every step that was taken by the Board to deal with this issue. And this information that Mr. Fellner is asking about was not provided, ***even after two motions to compel***." App. 0082 (emphasis added).

[7] The documentary evidence shows that the government outreach was made in March of 2015 and made no mention of the basement foundation wall. DX11 (App. 421-422).

> App. 191-194], please describe each and every action taken to mitigate the risk of collapse of the foundation wall, identify each person who took such action, and identify all documents and other tangible things that support your response and state the name, address, and telephone number of the person who has each document or thing.
>
> ANSWER: The Condominium pursued various efforts to remedy the alleged issue, including soliciting bids and attempting to obtain a loan. Those efforts are documented by the Meeting minutes provided.
>
> * * *
>
> INTERROGATORY NO. 12. Please describe in full detail each of the "various efforts to remedy the alleged issue, including soliciting bids and attempting to obtain a loan" as referenced in your response to interrogatory number two. As to each, *identify* all *documents* that you contend reflect the action taken, *identify* each person who took, or claims to have taken, the action, and state the date or dates on which the action was taken.
>
> ANSWER: The Board solicited funds from Congresswoman Norton and Mayor Muriel Bowser. The Board applied for a loan (application is attached), and considered a special assessment as well. The loan was in the process of being approved at the time the wall fell. The loan ultimately obtained by the Condominium in order to do repairs was essentially the same loan they had been pursuing prior to the collapse of the wall.

PX31: App. 333-334 (*see also* PX29 (App. 292), PX30 (App. 325-326) for definitions of italicized terms).[8]

[8] Fairfax Village's discovery responses came after two orders compelling responses to discovery. *See* Orders dated June 29, 2020 ("Motion to Compel and Incorporated

4. Fairfax Village obtained a $1,000,000 loan within three months of the collapse.

After "Mother Nature" intervened, pushing the repair "to the forefront of our property repair priorities," the Board suddenly found funding options available to finance repairs ***and upgrades*** up to more than $1 Million. PX14: App. 245, PX18: App. 264, PX19: App. 272. Only three months after the collapse of the foundation wall, Fairfax Village had received $1 million in funding from a loan. App. 0146-0147, 0163; PX20: App. 277 (confirming loan was approved and funds disbursed into escrow account).

IX. SUMMARY OF THE ARGUMENT

The effect of the trial court's ruling in this case is to add a requirement to an injured party's burden in addressing a condominium association's failure to make necessary structural repairs to common elements. Not only must the injured party plead and prove that the condominium association was on notice of a structural hazard in the common elements, failed timely to make repairs, and that the structural failure was the proximate cause of damage, the injured party must prove that the condominium association had the money—or the means to raise the money—to make the repairs.

Points and Authorities is GRANTED."); Aug. 10, 2021 (ordering Fairfax to "respond to Plaintiff's outstanding discovery requests in full").

The trial court erred in requiring expert testimony to establish the standard of care of the condominium association. Its Board was composed of lay persons, and they were faced with expert warnings that a bulging foundation wall was at risk of imminent collapse if not braced and repaired. The issues did not require scientific or technical expertise.

The trial court also erred as a matter of law in requiring KS Condo to prove that Fairfax Village had the wherewithal to pay for the repairs. Fairfax Village pled 10 affirmative defenses in its Answer in this case, and none of them remotely suggested an inability to pay for the repairs. App. 024-025. It was Fairfax Village's burden to prove its inability to raise the money *if that could be a viable defense*. In any event, KS Condo proved that Fairfax Village had the means to raise the necessary funds in time to prevent the collapse, and the trial court's determination that KS Condo did not do so is clearly erroneous.

Similarly, the trial court held KS Condo to a standard of proof unjustified by District of Columbia law. The trial court improperly held that only speculation could rule out intervening factors that may have played a role in the collapse or that the repairs, if made, would have been successful. This effectively raised the standard of proof from a preponderance of the evidence to liability beyond any reasonable doubt. This was legal error.

The Board recognized the urgency of repairing the basement foundation wall from March of 2015 until it collapsed 28 months later. But the Board never acted with urgency. It did not require expert testimony to determine that the Board acted unreasonably. This case should be reversed and remanded for a new trial.

X. ARGUMENT

A. KS Condo did not need to present expert testimony from a property manager to establish that Fairfax Village's Board had breached its standard of care.

The trial court correctly identified the duty owed to KS Condo to be that of a reasonable condominium association in the same or similar circumstances, like the duty a landlord owes its tenant. App. 0036-0037. The determination whether expert testimony is needed to prove what a reasonable condominium association or landlord would do in the same or similar circumstances is whether the "particular issue" is so distinctly related to some science, profession, or occupation that it is beyond the average layperson's understanding. *Thurman v. District of Columbia*, 282 A.3d 564, 573 (D.C. 2022) (citing *District of Columbia v. Peters*, 527 A.2d 1269, 1273 (D.C. 1987)). "[C]ourts should not leave it to 'a jury of tailors and haberdashers to pass judgment [unaided by expert testimony] on how to make a wet and rolling deck in a seaway a safe place to work.'" *Beard v. Goodyear Tire & Rubber Corp.*, 587 A.2d 195, 200 (D.C. 1991) (quoting *Zinnel v.*

United States Shipping Bd. Emergency Fleet Corp., 10 F.2d 47 (2d Cir. 1925) (dissenting op.)).

Conversely, "where a plaintiff alleges negligent conduct in a 'context which is within the realm of common knowledge and everyday experience, the plaintiff is not required to adduce expert testimony either to establish the applicable standard of care or to prove that the defendant failed to adhere to it.'" *Tolu v. Ayodeji*, 945 A.2d 596, 601 (D.C. 2008) (quoting *Varner v. District of Columbia*, 891 A.2d 260, 265 (D.C. 2006); *Beard*, 587 A.2d at 200).

The trial court "conclude[d] that KS Condo needed an expert in property management to testify that Fairfax's actions were unreasonable." App. 0038. "Without establishing a standard of care," wrote the court, "Plaintiff is unable to prove a breach of that standard." *Id.*

The trial judge in this case found it "beyond the ken of the average lay juror, or judge sitting without a jury, to identify the appropriate standard of care to which a condominium association must be held for remedial repairs." App. 0037 (citing *Katkish v. District of Columbia*, 763 A.2d 703, 705-706 (D.C. 2000); *District of Columbia v. Arnold & Porter*, 756 A.2d 427, 434 (D.C. 2000); *District of Columbia v. Billingsley*, 667 A.2d 837, 843 (D.C. 1995)). This conclusion by the trial court was clearly erroneous and an abuse of discretion.

In this case, a non-expert board was faced with what to do about a bulging foundation wall that had moved three inches *after* being advised by experts that the danger of the condition could not be overemphasized, that delaying action could result in collapse, and that the condition had to be "resolved as soon as possible." Moreover, the Board had itself in 2015 advised unit owners that it faced a serious structural issue that required urgent action within 30 days.

The trial court compared the bulging wall in 3810 V Street to the leaning tree in *Katkish*, but this was error and reflects a misunderstanding of *Katkish*. The need for expert testimony in *Katkish* was not the evaluation from inspection of a leaning tree; rather, it was the standard for a municipality to respond to a call from a landowner "reporting a tree that is 'dead' and 'leaning'" with no mention of an "emergency." 763 A.2d at 704; *see also* 763 A.2d at 705-06 ("Based on the trial court's finding that appellant did not convey the emergency nature of the situation, we agree with its ruling that expert testimony was necessary to establish the standard of care in this case.… The expert's testimony 'must clearly relate the standard of care to the practices in fact generally followed by other comparable governmental facilities or to some standard nationally recognized by such units.' … [A]n average lay person is not capable of discerning when a leaning tree may create a dangerous situation requiring an emergency response and

whether the likelihood of the tree falling is related to the condition of the tree, the street, or other circumstances.").

Unlike *Katkish*, the emergency nature of the foundation wall was clearly conveyed to the Board. The Board was advised in no uncertain terms that the "danger of the condition" could not be "over emphasize[d]." PX2: App. 190 (Dec. 10, 2015). "The issue of the buckled foundation wall at Building 3810 V Street is one that needs to be addressed and resolved as soon as possible." PX3: App. 194 (Dec. 21, 2015).

Arnold & Porter, *supra*, likewise is unhelpful in this case. Like *Katkish*, it involved the need for expert testimony to establish a national standard of care for municipal response, in that case to "the operation and maintenance of a municipal water main system and the handling of leaks in that system." *Arnold & Porter*, 756 A.2d at 433-34. And contrary to the trial court's description of *Billingsley* that "expert testimony was required to prove standard of care for the proper maintenance of a sewer system and causation in suit for property damage flowing from sewer backup …," this Court in *Billingsley* did not decide that expert testimony was necessary. Rather, this Court explained,

> Under the circumstances, we need address only briefly the District's argument that expert testimony is required to prove the standard of care for the proper maintenance of a sewer system and causation. There are likely aspects of this specialty which are too technical to be within the common knowledge of laypersons, for example, whether

> it was within the standard of care for the District to rely to some degree upon a self-cleaning sewer system or to use a "jet vac" to clear out the blockage. Such evidence might be best developed through expert testimony.

Billingsley, 667 A.2d at 843.

The question that the trial court, as factfinder, had to address in this case was what a reasonable condominium association or landlord would do after observing a foundation wall bulging and being told by structural engineers to fortify or repair it as soon as possible. The expertise of structural engineering and professional property management was already baked into the cake by the advice that the Board had received and passed on to the unit owners. And the question required no specialized scientific, professional, or occupational knowledge, only a layperson's understanding. It came down to whether it was reasonable to allow 28 months to pass from recognizing the urgency without the beginning of physical work to shore (*i.e.*, reinforce) or repair the wall when the Board had been warned by the experts of its urgent need for repair. Indeed, in denying Fairfax Village's motion for judgment as a matter of law, the trial judge said, "But you've got a bulging wall -- or a bulging retainer wall. It doesn't take an expert to realize that there's a problem that it's going to eventually burst." App. 0151.

The determination of whether expert testimony is required must be made on a case-by-case basis; it is legal error to apply a blanket rule, as the trial court did here (*i.e.*, holding (App. 37-38) that expert standard of care testimony is

required on a condominium association's need to make remedial repairs), rather than considering the individualized facts of the case. *Kotsch v. District of Columbia*, 924 A.2d 1040, 1047 (D.C. 2007) (holding "the trial court committed legal error in imposing such a requirement"); *Daskalea v. District of Columbia*, 343 U.S. App. D.C. 261, 227 F.3d 433, 445 (2000).

No expert testimony was necessary to inform the factfinder of the standard of care in this case because the "particular issue" was not so distinctly related to some science, profession, or occupation that it was beyond the average layperson's understanding. Indeed, this Court has explained that the causes of action in which expert testimony will be *required* are rare. *Payne v. Soft Sheen Prods.*, 486 A.2d 712, 727 n.17 (D.C. 1985) (citing *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962)). Expert testimony is required only when "the subject matter is too technical for the lay juror." *District of Columbia v. Hampton*, 666 A.2d 30, 36 (D.C. 1995).

B. The trial court abused its discretion by holding that KS Condo *required* expert testimony on the standard of care owed by Fairfax Village.

Review for abuse of discretion involves the following four questions:

> (1) whether the matter at issue was in fact committed to the court's sound discretion;
>
> (2) whether the trial court recognized that it had the discretion, and if so, whether the court purported to exercise that discretion;

> (3) whether the record reveals sufficient facts upon which the court based its decision; and
>
> (4) whether the trial court exercised its discretion erroneously.

Herbin v. United States, 683 A.2d 437, 442 (D.C. 1996). Each factor is addressed in turn.

1. Whether The Matter at Issue Was in Fact Committed to The Court's Sound Discretion.

There is authority in the District of Columbia that the determination that expert testimony was required is subject to an abuse of discretion standard. This appears to be both inconsistent with the standards by which a decision is vested in the discretion of the trial judge (*Johnson v. United States*, 398 A.2d 354, 363 (D.C. 1979) ("For an appellate court to determine whether it should employ a deferential abuse of discretion regimen in review, it must know whether it is called upon to examine the trial court's exercise of judgment or its application of factual findings to a rule of law.") and a mistaken reading of cases that appropriately subject the *admission or exclusion* of expert testimony to an abuse of discretion standard. *See, e.g., In re Melton*, 597 A.2d 892, 897 (D.C. 1991) (*en banc*) ("The trial judge has wide latitude in the admission or exclusion of expert testimony, and his decision with respect thereto should be sustained unless it is manifestly erroneous.") (*cited in District of Columbia v. Tulin*, 994 A.2d 788, 795 (D.C. 2010), for the proposition that the decision to require expert testimony on standard

of care is reviewed for abuse of discretion), and *Ohio Valley Constr. Co. v. Dew*, 354 A.2d 518 (D.C. 1976) (cited in *District of Columbia v. White,* 442 A.2d 159, 165 (D.C. 1982); and *District of Columbia v. Davis*, 386 A.2d 1195, 1200 (D.C. 1978), for this proposition). Other cases setting forth this same holding, likewise, rely on the mistakes carried forward in prior cases. *See, e.g., Varner v. District of Columbia*, 891 A.2d 260, 266 (D.C. 2006) (citing *White* and *Davis*); *Kakaes v. George Wash. Univ.*, 790 A.2d 581, 586 (D.C. 2002) (citing *Davis*).

White and *Davis* appear to recognize the leap they made from *Ohio Valley Constr. Co.* by stating, "whether or not to admit (***and presumably to require***) expert testimony is within the discretion of the trial court, whose ruling should be sustained unless clearly erroneous." *White*, 442 A.2d at 165; *Davis*, 386 A.2d at 1200 (emphasis added).

Most courts to have addressed the issue have concluded that *de novo* review is appropriate when a trial court *requires* expert testimony. *See, e.g., Bittner v. Centurion of Vt., LLC*, 2021 VT 73, ¶ 23, 264 A.3d 850, 855 (Vt. 2021) ("Whether plaintiff's medical malpractice claim requires expert testimony is a question of law that we review without deference."); *FFE Transp. Servs. v. Fulgham*, 154 S.W.3d 84, 89-90 (Tex. 2004) (reasoning that a ruling that expert testimony is required raises a question of what legal weight should be given to non-expert evidence in the record, which is a question of law); *Tousignant v. St.*

Louis Cnty., 615 N.W.2d 53, 58 (Minn. 2000) (reviewing without deference whether medical malpractice claim required affidavit of expert testimony pursuant to statutory requirement and explaining that this is an issue of law); *D.P. v. Wrangell Gen. Hosp.*, 5 P.3d 225, 228 (Alaska 2000) ("Whether expert testimony is required to show a breach of a duty of care represents a question of law to which we apply our independent judgment."); *Vandermay v. Clayton*, 328 Ore. 646, 655, 984 P.2d 272, 277 (Or. 1999) ("Whether expert testimony is necessary to establish that a defendant's conduct fell below the standard of care is a legal question that the court must determine by examining the particular malpractice issues that the case presents."); *Bauer v. White*, 95 Wn. App. 663, 666, 976 P.2d 664, 666 (Wash. 1999) ("The question here is one of law. Must a patient present an expert medical opinion that unintentionally leaving a foreign body in a surgical patient violates the standard of care for physicians in this state to withstand a motion for summary judgment? Because the question is one of law, review is *de novo*.").

Applying *de novo* review to this question makes perfect sense. Take the worst-case example. A trial judge decides in a slip-and-fall case that an expert must provide the standard of care of a department store to remove a banana peel left on the floor in a public area of the store. The plaintiff, who has established through factual testimony that the banana peel was on the floor for seven days suffers an adverse judgment as a matter of law for not offering expert testimony.

There is no reason to review the ruling on a discretionary basis; it should be reversed as an error of law.

2. Whether The Trial Court Recognized That It Had the Discretion, And If So, Whether the Court Purported to Exercise That Discretion.

The trial court's finding of facts and conclusion of law do not even suggest that requiring an expert to provide a standard of care is a discretionary ruling. For reasons stated in the previous subsection, this is completely understandable.

The determination to *require* expert testimony to provide a standard of care should not be discretionary, and the trial court appears not to have viewed it as discretionary. The trial court simply stated as fact, "It is beyond the ken of the average lay juror, or judge sitting without a jury, to identify the appropriate standard of care to which a condominium association must be held for remedial repairs." App. 0037-0038.

3. Whether The Record Reveals Sufficient Facts Upon Which the Court Based Its Decision.

Because the determination whether expert testimony on the standard of care is required does not lend itself to discretionary decision-making, it is difficult to identify factors that a court would consider were it attempting a discretionary decision. *See Johnson*, 398 A.2d at 361 ("Discretion signifies choice. First, the decision-maker exercising discretion has the ability to choose from a

range of permissible conclusions. The decision-making activity is not ministerial and the various elements of the problem do not preordain a single permissible conclusion."). The trial court discussed, though inaccurately, steps Fairfax Village had taken toward making the needed repairs and then repeated its conclusion that "KS Condo needed an expert in property management to testify that Fairfax's actions were unreasonable." App. 0038. There was no explanation as to why these steps would place the issue in the realm of specialized knowledge and experience.

4. Whether The Trial Court Exercised Its Discretion Erroneously.

The court reviewing the decision for an abuse of discretion must determine "whether the decision maker failed to consider a relevant factor, whether he relied upon an improper factor, and whether the reasons given reasonably support the conclusion." *Herbin*, 683 A.2d at 443 (quoting *Johnson*, 398 A.2d at 363-65). "[T]he appellate court should inquire whether the trial court's reasoning is substantial and supports the trial court's action. *Johnson*, 398 A.2d at 365.

The totality of the trial court's discussion of this issue appears at App. 0038-0039. The trial court's list of steps that Fairfax Village supposedly took toward repairing the failing foundation wall (*i.e.*, exploring financing options, retaining inspection, design, and management firms, contracting for the necessary work, and applying for financing) ignores completely the timing of the critical

steps that were not accomplished more than two years after the urgency of the situation was recognized by the Board.

It is true that the Board explored two of the three financing options it had available to it if "explored" is meant as considered, discussed, or shared with the unit owners. But of those two, the Board *never* issued a special assessment and there was *no evidence* that the Board even applied for a loan until April of 2017. There also was *no evidence* that the Board *ever* contracted for any shoring or repair work.

The trial court asserts that "KS Condo leaps to the conclusion that because Fairfax obtained financing within three months after the collapse, Fairfax's delay in making the repairs was unreasonable." App. 0038. That simply is untrue. It was always about allowing so much time to pass without stabilizing or repairing the wall. *See* App. 0027 (*trial court finding*: "The trial centered on the … Board['s] actions over a two-year period to address the condition of the wall."); Opening Statement (App. 0054-0065) ("The issues, Your Honor, that you will be asked to decide are relatively straightforward. First, whether the Board of Fairfax Village was negligent in failing to take timely steps to repair a foundation wall they knew for more than two years was at [im]minent risk of collapse …."); KS Condo, LLC's Proposed Findings of Facts and Conclusions of Law (filed Mar. 9, 2022), pp. 1-2 ("This case, and the trial, was about why the condominium

association board of directors …, which knew for more than two years that the foundation wall was at imminent risk of collapse, did not take timely steps to prevent the collapse. [¶] For more than two years, the Board told the condominium homeowners that the wall was in imminent danger of collapse and needed immediate repairs. They told the owners that it would take about $175,000 (later increased to $250,000) to make the repairs and that the Board had two means of raising the funds, borrowing the money or issuing a special assessment, both actions the Board—in addition to bringing foreclosure proceedings against units with substantial unpaid dues—was empowered by the Bylaws to take.[9] [¶] Even after the trial, it is unclear why the Board slow-rolled and did not arrange financing until after the wall had collapsed and the repair cost doubled. At every step along the way, the Board delayed the process all the while telling the owners the risk was "SERIOUS," the need "urgent," and the consequences of failure to act would be collapse of the wall and lawsuits against the condo association."). KS Condo pointed to the speed at which the Board was able to obtain a loan of $1 million (four times what was needed before the collapse to make the repair) quickly after the collapse only to show that it could have accomplished the repair long before the collapse had it moved with due purpose. *See* KS Condo, LLC's Proposed Findings, pp. 2, 13.

[9] *See* App. 0027-0028 (*trial court finding*).

The trial judge next asserted that

> KS Condo's argument is speculative and not necessarily true because desperate circumstances call for desperate measures that still may not be reasonable. This Court concludes that KS Condo needed an expert in property management to testify that Fairfax's actions were unreasonable. Without establishing a standard of care, Plaintiff is unable to prove a breach of that standard. Plaintiff contends that Fairfax should have collected more funds that were due to it but does not state in what amount, what percentage of the amount due, or by what date. Plaintiff contends that Fairfax was obligated to pass and collect a special assessment but does not state in what amount or by what date. Plaintiff contends that Fairfax was obligated to make certain repairs to the common elements but does not state what repairs (that information is not in evidence) and does not establish by any proof that such repairs, even if made upon a certain date, would have prevented the collapse.

App. 0038-0039.

The entirety of this passage is either a non-sequitur or untrue, and there was nothing speculative about KS Condo's case. The Board knew that a foundation wall was collapsing and required urgent repair. App. 0029 (*trial court finding*). KS Condo never suggested the Board had to use a special assessment over another means of fundraising, just that they had to act with reasonable promptness given the urgent circumstances. While "desperate circumstances [may] call for desperate measures that still may not be reasonable,"[10] KS Condo never

[10] We say "may" because we are unsure we understand the trial court's point. Desperate circumstances do call for desperate measures and their reasonableness

suggested unreasonable measures, only prompt correction of a condition the Board recognized as "urgent."

As for the assertion that KS Condo did not state what amount of funds should have been collected, "what percentage of the amount due, or by what date," the Board had generated an estimate that the repair cost would be $250,000. App. 0027-0028 (*trial court finding*). KS Condo proved that Fairfax Village had the means to raise that amount. Not only did the Board tell the unit owners that it could raise funds by levying a special assessment or borrowing the money, the Board borrowed substantially more money very quickly after the wall collapsed (specifically, $1 million was received three months after the collapse, which was six months after the Board first applied for the $400,000 loan).

As for the assertion that KS Condo "contend[ed] that Fairfax was obligated to pass and collect a special assessment but does not state in what amount or by what date," KS Condo was never focused on a special assessment, but the amount that needed to be raised through one or more of the three means available to the Board was, of course, the same $250,000.

As for the date, because this was not an issue that was too technical for a lay factfinder, it was for the trial court to decide the extent of delay of work

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must be measured in relation to the desperateness of the circumstances that prompt them.

before reasonable turned unreasonable. But KS Condo proved that, "[i]n March of 2015, the Board identified a 'SERIOUS' issue with the basement of 3810 V … [and] advised the homeowners that an 'urgent' repair '***needs to start within 30 days***.' App. 0029 (trial court finding). "The Board further advised that Fairfax would be at risk of lawsuits if it did not make the needed repairs." *Id.* And that work had not even begun by July 29, 2017. PX31 (App. 332, Admission 12). Letting more than two years pass without either stabilizing or repairing the wall was unreasonable. At what point during those 28 months that reasonable turned to unreasonable was for the factfinder.

Finally, the trial court criticizes KS Condo for not specifying "what repairs (that information is not in evidence)" or "establish[ing] by any proof that such repairs, even if made upon a certain date, would have prevented the collapse." The trial court's assertions in this regard were clearly erroneous and the issue not legally relevant. *The trial court found* that "Falcon explained that the foundation wall would have to be excavated and reconstructed, and … [t]he plan included temporary shoring of the existing structure to allow for excavation and reconstruction. App. 0030.

Likewise, the evidence included that the Board reported that the project would take 3-6 months to complete and would require excavating a major section of the courtyard. PX9: App. 223. Moreover, the evidence showed that—

even after the collapse—the foundation was repaired and 3810 V Street restored to habitability. App. 0034 ("The President of the Board emailed KS Condo on July 7, 2018, to advise that Unit 101 was ready for habitation…."). Detailed design plans, construction drawings, and the like were unnecessary to the issues in the case. None of this was so technical that the trial judge needed the help of an expert to understand, because the negligence had nothing to do with the repair method; it was all about not acting when the need is urgent and the risk substantial.

The trial court's analysis does not support its conclusion that expert testimony was required. The issues the trial court—as factfinder—needed to decide were not technical. The trial court abused its discretion in concluding that expert testimony was necessary.

C. The trial court erred by assigning the burden of proving that Fairfax Village could raise the funds needed for the repair to KS Condo.

The trial court placed an inappropriate burden on KS Condo. KS Condo should not have the burden to plead or to prove that Fairfax Village had the financial means to make an urgent repair (although it did prove that Fairfax Village had the means). *See, e.g., Rankin v. Buckman*, 9 Or. 253, 264-65 (1881) ("From this review it is our opinion that it is not necessary to allege in the complaint the possession of the requisite funds by the defendants to make the repair, but that

prima facie such means exist, and the absence of them must be shown by way of defense.").

The trial court appropriately found that the condominium association's duty to the unit owners is the same as a landlord's duty to a tenant. A tenant who is injured by a landlord's failure to repair a dangerous condition would not have the burden of proving that the landlord had enough money to effectuate necessary repairs. If lack of money is any defense in that situation, surely it is the landlord's burden to prove (*i.e.*, an affirmative defense).

The list of affirmative defenses in Rule 8(c) of the Superior Court Rules of Civil Procedure is not exhaustive. Super. Ct. R. Civ. P. 8(c) (emphasis added) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, ***including***: …."); *see, e.g., Shell Oil Co. v. United States*, 896 F.3d 1299, 1315 (Fed. Cir. 2018) ("Although mitigation by third party payment is not explicitly listed in [Rule] 8(c), generally, any defenses that 'admit the allegations of the complaint but suggest some other reason why there is no right of recovery [or] concern allegations outside of the plaintiff's prima facie case that the defendant therefore cannot raise by simple denial in the answer' are considered affirmative defenses."); *Dollar v. Smithway Motor Xpress, Inc.*, 710 F.3d 798, 808 (8th Cir. 2013) ("[T]he list of enumerated defenses is exemplary rather than exclusive, and the failure to plead this particular affirmative defense

results in waiver."). Examples previously identified by this Court include unconscionability (*Falconi-Sachs v. LPF S. Square, LLC*, 142 A.3d 550, 555 (D.C. 2016)), privilege (*Howard Univ. v. Wilkins*, 22 A.3d 774, 786 n.12 (D.C. 2011)), mistake (*Flippo Constr. Co. v. Mike Parks Diving Corp.*, 531 A.2d 263, 267 (D.C. 1987)), collateral estoppel (*Jackson v. District of Columbia*, 412 A.2d 948, 951 (D.C. 1980)), agency (*Pryme Constr. Corp. v. Nickolson*, 193 A.2d 739, 740 (D.C. 1963)), and setoff (*Wright v. McCann*, 122 A.2d 334, 335-36 (D.C. 1956)). Fairfax Village did not prove its inability to fund the repairs, and the trial court erred in assigning to KS Condo the burden of proving that Fairfax Village had the means to raise sufficient funds.

D. The trial court's conclusion, that KS Condo failed to prove that Fairfax Village acted unreasonably, is clearly erroneous.

Despite concluding he needed an expert to tell him what a reasonable condominium board would have done in the same or similar circumstances,[11] the trial judge concluded that "KS Condo did not carry its burden to show Fairfax acted unreasonably." This holding is clearly erroneous because the evidence upon which the trial court relied is "so slight or insufficient as to fail to rationally support a finding by [a preponderance of the evidence]" and Fairfax Village "failed

[11] *Sullivan v. AboveNet Commc'ns, Inc.*, 112 A.3d 347, 358 (D.C. 2015) ("[I]f the standard itself is not proven, then a deviation from that standard is incapable of proof." (internal quotation marks omitted)).

to present any evidence upon which a reasonable mind could find [that the Board acted reasonably.]" *Mingle v. Oak St. Apartments Ltd.*, 249 A.3d 413, 415-16 (D.C. 2021). The trial court did not know what the standard of care was but decided that whatever it was it was met; this was improper. *See Hampton*, 666 A.2d at 37 (quoting *District of Columbia v. Carmichael*, 577 A.2d 312, 314 (D.C. 1990) (holding that, when the standard is unknown, "a deviation from that standard is incapable of proof.")).

The entirety of the trial court's analysis to conclude that KS Condo had not proved that the Board acted unreasonably is this:

> There was testimony that Fairfax had uncollected assessments which could have financed repairs. However, many of the condominium owners were elderly and on a fixed income. Some had even declared bankruptcy. Moreover, there was no testimony that the ultimate funding for the repairs was fair and reasonable. The Court is left to speculate as to the ultimate fate of Fairfax despite the wall repair.

App. 0039.

The evidence showed, and the trial court found, that the Board had three means to raise the money to repair the failing foundation wall, a special assessment, a loan, and foreclosure against delinquent unit owners. The trial court's analysis of reasonableness makes no mention of special assessments, discounts a loan as the funding source on the basis that no one testified that the "ultimate funding for the repairs was fair and reasonable," and rejects foreclosure

on the basis that "many of the condominium owners were elderly and on a fixed income" and some had declared bankruptcy.

The trial court ignored the viability of a special assessment and dismissed the loan option on the itself speculative basis that the much greater level of funding obtained after the collapse might not have been fair and reasonable. In fact, the evidence showed that the terms of the loan were reasonable: 7% interest rate and payable over 10 years, *both before and after the collapse*. PX14: App. 252; DX1: App. 394. There was no testimony (or even any assertion) that the loan terms were unfair or unreasonable. And the testimony about elderly and bankrupt owners was so slight or insufficient as to fail to rationally support a finding by a preponderance of the evidence.

There was no evidence about the age of unit owners or their status as elderly or otherwise. The closest the evidence came to *implying* older age among the unit owners was the question, "Do owners sometimes die? And the answer "Yes, they do." App. 0085. The totality of the testimony on bankrupt owners was the following two questions and answers:

> Q. Do owners sometimes declare bankruptcy?
>
> A. Yes, they do.
>
> * * *
>
> Q. That $300,000 in AR that Mr. Stern is referencing, might that have included some bankruptcy amounts that were uncollectible?

> A. Oh, yeah. Bankruptcy situations, folks – unit owners passing away, died, the association doesn't -- didn't have the funds to proceed foreclosures on situations. It was just a lot of -- a lot of issues.

App. 0085-0086.

As stated above, the admitted exhibits contained data on deaths and bankruptcies that showed they would not have been an impediment to collecting the amount needed for the pre-collapse repair. As of May of 2016, bankrupt and deceased unit owners accounted for $75,000 of the approximately $400,000 owed to the condominium association, leaving well more than the $250,000 needed for the pre-collapse repair. But that aspect of the analysis is relevant only to the foreclosure approach to raising the money, not the loan or special assessment approaches, which the trial court failed to consider.

E. The trial court's conclusion of law that causation is speculative is either a misapplication of law or a clearly erroneous finding of fact.

The trial court copied, almost verbatim, a paragraph of Defendant's Proposed Findings of Fact and Conclusions of Law (filed March 30, 2022) ("Proposed Findings") arguing that proof of causation was speculative. *Compare* Proposed Findings at 1 *with* App. 39.[12] This conclusion is erroneous as a matter of law, "plainly wrong," and "without evidence to support it." *Mingle*, 249 A.3d at

[12] It was in the "Findings of Fact" section of Fairfax Village's submission, but the trial court placed it in the "Conclusions of Law" section of its findings.

415. Issues of law are reviewed *de novo*, while factual findings are reviewed for clear error. *United States Bank, N.A. v. 1905 2nd St. NE, LLC*, 85 A.3d 1284, 1287 (D.C. 2014); *Mingle*, 249 A.3d at 415.

It is within the realm of common knowledge and everyday experience that a structure such as a wall can be braced (shored) to prevent collapse and facilitate repairs. And in any event, ***Fairfax Village presented evidence*** not only that the repair was feasible and would succeed but that the Association planned to make this very repair, *e.g.*, DX13: App. 426-445 *see also* PX14: App. 246; PX15: App. 256; PX17: App. 262; PX19: App. 270 (all showing that even after the collapse the wall was being temporarily shored to allow permanent repair), but never got around to funding it. Indeed, the repair procedure that the Board hired Falcon to design involved "temporary shoring … to allow for demolition and reconstruction of the subject foundation wall." DX13: App. 432.

Speculation is unnecessary to conclude that a buckling wall that later collapses would not have collapsed had it been braced and repaired. There was evidence that, in addition to the dire warnings that the Board received, the wall was buckling and displaced by three inches by December of 2015. *See* Figure 1, above. Nothing was done about it and it later collapsed.

The trial court's (really Fairfax Village's but copied by the trial court) assertion that "it is impossible to say whether intervening factors existed and

whether the proposed work on the structure would have prevented the collapse" is the only speculation here. *Cf. Tribble v. District of Columbia*, No. 2013 CA 003237 B, 2016 D.C. Super. LEXIS 4, *53 (D.C. Super.Ct. Feb. 26, 2016) (where plaintiff established that he became addicted to heroin during his wrongful incarceration, the defense argument "that Mr. Tribble would have used heroin absent incarceration" was "entirely speculative," and it was unnecessary for plaintiff to "negate the possibility that he might have tried heroin outside prison.").

If Fairfax Village wished to show that extraordinary factors somehow made it impossible to conduct the repair it all along planned to make, it had the burden of bringing forward evidence to show such extraordinary circumstances. Plaintiff's burden of proof on causation does not require it to rule out all possibilities. *E.g., Providence Hosp., Inc. v. Willis*, 103 A.3d 533, 535, n. 3 (D.C. 2014) (holding causation must be proved by a preponderance, *i.e.*, that it is more likely than not, and does not require that other possibilities be ruled out).

It was error for the trial court to hold KS Condo to such a high standard of proof. "Requiring [KS Condo to disprove the possibility of intervening factors] would amount to increasing [its] burden of proof to something akin to the standard in criminal cases. *Providence Hosp., Inc.*, 103 A.3d at 535.

XI. CONCLUSION

The trial court erred in holding that expert testimony was necessary in this case to establish the standard of care of a condominium association board composed of lay persons faced with expert warnings that a bulging foundation wall was at risk of imminent collapse if not braced and repaired. The issues involved were understandable to a lay jury and did not require scientific or technical expertise.

The trial court erred as a matter of law in assigning to KS Condo the burden of proving that Fairfax Village had the means to timely raise funds to make the urgently needed repairs. Inability to pay for the repairs, if a defense at all, was Fairfax Village's burden to prove. Moreover, although not its burden, KS Condo proved that Fairfax Village had the means to raise the necessary funds in time to prevent the collapse.

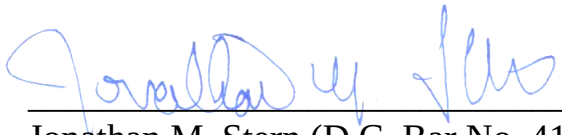
Finally, requiring proof that intervening factors played no role and that the repair would have succeeded improperly raised the burden of proof from a preponderance standard to a beyond reasonable doubt standard.

This case should be reversed and remanded for a new trial.

Dated: January 23, 2023

Respectfully submitted,

KS Condo LLC
By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on this January 23, 2023, a true and correct copy of the foregoing APPELLANT'S BRIEF was filed with the Court's electronic filing system, which I understand will provide service to:

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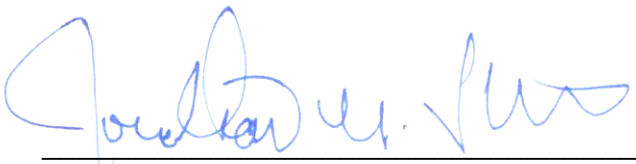

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REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayeridentification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ *Jonathan M. Stern*
Signature

No. 22-CV-593
Case Number(s)

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